Office - Supreme Court, U.
APR 15 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 732

MERCHANTS MATRIX CUT SYNDICATE, INC., INTERTYPE CORPORATION AND THE ADVERTISING CHECKING BUREAU, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA AND CLARK-CONGRESS CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDWARD B. LUCIUS,
EDWARD G. LUCIUS,
135 S. La Salle St.,
Chicago 3, Illinois,
Attorneys for Petitioner Merchants Matrix Cut Syndicate, Inc.

SHERWOOD K. PLATT,
CHARLES L. STEWART, JR.,
231 S. La Salle St.,
Chicago 4, Illinois,
Attorneys for Petitioner Intertype Corporation.

HORACE A. YOUNG,
135 S. La Salle St.,
Chicago 3, Illinois.
Attorney for Petitioner The Advertising Checking Bureau, Inc.

Of Counsel:
MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT
LUCIUS & LUCIUS.

April 15, 1955.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

BLEED THROUGH POOR COPY

INDEX.

PAGE

Opinions below.....2, 71 (in App.)

Jurisdiction..... 2

Questions presented..... 2

Constitutional Provisions, Statutes and Rules Involved .....4, 41 (in App.)

Statement..... 5

Reasons for granting the writ..... 14

Conclusion..... 40

Appendix..... 41

Statutes and Rules Involved..... 41

Findings of Fact..... 47

Conclusions of Law..... 55

Instructions to the Jury..... 60

Proceedings in Court of Appeals..... 70

Text of Opinion of Court of Appeals..... 72

CITATIONS.

Cases.

Alexis v. Pittinger, 119 Wash. 626, 206 Pac. 370 (1922) 27
Bagby v. Hodge, 297 S. W. 882 (Tex. Civ. App. 1927). 27
Bancroft v. Godwin, 41 Wash. 253, 83 Pac. 189 (1905). 27
Bank of the United States, The v. Planters' Bank, 9 Wheat. (22 U. S.) 904 (1824) 22
Brady v. Roosevelt Steamship Co., 317 U. S. 575 (1943) 22, 24-25
Case v. Minot, 158 Mass. 577, 33 N. E. 700 (1893)..... 27
Central Ry. Signal Co. v. Longden, 194 F. 2d 310 (7 Cir., 1952)..... 16
Chapman v. Kirby, 49 Ill. 211 (1868)..... 27
City of Oakland v. U. S., 124 F. 2d 959 (9 Cir., 1942)... 33
Dearlove v. Herrington, 70 Ill. 251 (1873)..... 27
Dehan v. Youree, 161 La. 806, 109 So. 498 (1926)..... 27
Dobbins v. Duquid, 65 Ill. 464 (1872)..... 27
Dolman v. United States Trust Co., 134 N. Y. S. 2d 508 (1954)..... 27-29
Erie R. Co. v. Tompkins, 304 U. S. 64 (1938)..... 30
Federal Land Bank v. Priddy, 295 U. S. 229 (1935).... 22
Gillen v. Home Owners' Loan Corp., 280 N. Y. 261, 21 N. E. (2d) 521 (1939)..... 24
Glickauf v. Maurer, 75 Ill. 289, 20 A. R. 238 (1874)... 27
Gustin v. Barney, 250 Ill. App. 209 (1928)..... 27
Hanson Co. v. U. S., 261 U. S. 581 (1923)..... 34
Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381 (1939)..... 22
Kesner v. Consumers Co., 239 Ill. App. 92 (1925)..... 27
Kuhn v. Fairmont Coal Co., 215 U. S. 349 (1910)..... 29

BLEED THROUGH POOR COPY

McAllister v. U. S., 348 U. S. 19 (1954) 18
Northern Trust Company v. Palmer, 171 Ill. 383, 49 N. E. 553 (1898) 27
Paltey v. Egan, 200 N. Y. 83, 93 N. E. 267 (1910) 27
Prato v. Home Owners' Loan Corp., 106 F. 2d 128 (1 Cir., 1939) 24
Ramming Real Estate Co. v. U. S., 122 F. 2d 892 (8 Cir., 1941) 20
Seaboard Air Line Ry. Co. v. U. S., 261 U. S. 299 (1923) 34
Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp., 258 U. S. 549 (1922) 22, 23-24
Swift v. Tyson, 16 Pet. (41 U. S.) 1 (1842) 27
Tobin v. French, 93 Ill. App. 18 (1901) 27
U. S. v. General Motors Corp., 323 U. S. 373 (1945) 19, 21, 22, 37
U. S. v. Lee, 106 U. S. 196 (1882) 22
U. S. v. National Association of Real Estate Boards, 339 U. S. 485 (1950) 16
U. S. v. Petty Motor Co., 327 U. S. 372 (1946) ...19, 22, 26
U. S. v. Westinghouse Electric & Mfg. Co., 339 U. S. 261 (1950) 19, 22, 26, 39
U. S. v. Yellow Cab Co., 338 U. S. 338 (1949) 16
Wood v. Monteleone, 118 La. 1005, 43 So. 657 (1907) .. 27
Woods Theatre v. North American Union, 246 Ill. App. 521 (1927) 27
Wusthoff v. Schwartz, 32 Wash. 337, 73 Pac. 407 (1903) 27

Constitutional Provisions.

Amendment V 4, 26, 36

Statutes.

Title 28, U. S. C., Section 1254(1) 2
Section 1652 .....4, 30

Title 40, U. S. C., Section 257 ..... 4, 11
Section 258a 4, 11, 33
Section 304c 4, 6, 11, 32

Federal Rules of Civil Procedure.

Rule 8(c) 13
Rule 13 ..... 4, 13, 14, 17, 26
Rule 18(a) 4, 13, 14
Rule 19 13
Rule 42(b) 4, 14, 31
Rule 52(a) 2, 5, 15, 16, 17, 18
Rule 61 ..... 2, 5, 15, 16, 20
Rule 71A 5, 13, 14, 17, 26, 31

Miscellaneous

51 Corpus Juris Secundum, §§ 319-325 27

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. .....

MERCHANTS MATRIX CUT SYNDICATE, INC., INTERTYPE CORPORATION, AND THE ADVERTISING CHECKING BUREAU, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA AND CLARK-CONGRESS CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your Petitioners, Intertype Corporation, a New York corporation, Merchants Matrix Cut Syndicate, Inc., an Illinois corporation, and The Advertising Checking Bureau, Inc., an Illinois corporation (sometimes referred to herein as Intertype, Merchants and Advertising, respectively), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 17, 1955 in the case of The United States of America v. Merchants Matrix Cut Syndicate, Inc. and Intertype Corporation, No. 11017 in said court, together with the judgment of the same court

entered on the same day pursuant to the same opinion, in the cases of Intertype Corporation v. Clark-Congress Corporation, Merchants Matrix Cut Syndicate, Inc. v. Clark-Congress Corporation, and The Advertising Checking Bureau, Inc. v. Clark-Congress Corporation, Nos. 11018-11020 in said court.

OPINIONS BELOW.

The United States District Court for the Northern District of Illinois, Eastern Division, rendered no opinion in this case. Its Findings of Fact and Conclusions of Law with respect to three of the five judgments (R. 1077-1088) are printed at pp. 47-60, and its jury instructions with respect to the other two judgments (R. 549-558) are printed at pp. 60-69, in the Appendix bound with this Petition. The opinion of the Court of Appeals for the Seventh Circuit is printed at pp. 71-87 in the Appendix, and is reported in 219 F. 2d at p. 90.

JURISDICTION.

The judgments of the Court of Appeals were entered on January 17, 1955 (App., pp. 88, 89). Various petitions for rehearing filed by the petitioners were denied on February 23, 1955 (App., p. 91). The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Did the Court of Appeals have the authority to totally disregard the evidence, the findings of fact and the jury instructions and verdicts, and reverse these five judgments without pointing out anything clearly erroneous and prejudicial in the proceedings below, despite the express provisions of Rules 52(a) and 61 of the Federal Rules of Civil Procedure?

BLEED THROUGH POOR COPY

2. Do the prior decisions of this Court in federal eminent domain cases extend the immunity of the sovereign to protect petitioners' private landlord against liability for violating petitioners' rights under the law of the State of Illinois?

3. Do the prior decisions of this Court in federal eminent domain cases conflict with the Federal Rules of Civil Procedure which authorized the District Court to hear and determine petitioners' claims for relief against their landlord in separate proceedings, but as a part of the condemnation case arising out of the same transactions?

4. Did the statutes authorizing the General Services Administration to lease and improve office space warrant the taking of petitioners' property immediately without depositing its estimated value, remodeling it at unauthorized expense, and delaying the payment of compensation to petitioners for more than three years after the taking?

5. Do the arbitrary means employed in the peacetime taking of petitioners' leased space for occupancy by the Bureau of Public Debt without just compensation to this day, aggravated by the reversal of the jury verdicts without even a hint as to how the new trial could be conducted to avoid another appeal and reversal, constitute a denial of the due process of law and just compensation guaranteed to petitioners by the Fifth Amendment?

6. Did the Court of Appeals have discretion to override the consent of the trial attorneys for the United States to the instructions given to the jury, and their stipulation that Intertype be compensated for the value of the entire remaining time of its leasehold instead of the value of only five years of it, and did such whipsawing of the condemnees in the circumstances of this case add up to a denial of their right to due process of law?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

1. Constitution.

Amendment V to the Constitution of the United States:

> "No person shall * * *; * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Statutes and Rules.

Title 28, U. S. C., § 1652, June 25, 1948, c. 646, § 1, 62 Stat. 944:

> "§ 1652. State laws as rules of decision.
>
> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The other Statutes and Rules involved are cited below. In view of their aggregate length they are printed at pp. 41-46 in the Appendix bound with this petition.

Title 40 U. S. C. § 304c, Aug. 27, 1935, c. 744, § 3, 49 Stat. 886; July 18, 1940, c. 635, § 3, 54 Stat. 765; June 14, 1946, c. 404, § 4, 60 Stat. 257; June 30, 1949, c. 288, Title I, § 103, 63 Stat. 380.

Title 40 U. S. C. § 257, Aug. 1, 1888, c. 728, § 1, 25 Stat. 357; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 25, 1948, c. 646, § 6, 62 Stat. 986.

Title 40 U. S. C. § 258a, Feb. 26, 1931, c. 307 § 1, 46 Stat. 1421.

Federal Rules of Civil Procedure:

Rule 13, Subparagraphs (a), (b), (g) and (i).
Rule 18(a).

BLEED THROUGH POOR COPY

Rule 42(b).
Rule 52(a).
Rule 61.
Rule 71A, Subparagraphs (a) and (e).

STATEMENT.

This case presents for review five judgments totalling $357,726.67, entered in 1953 by the United States District Court for the Northern District of Illinois, Eastern Division and reversed on January 17, 1955 by a single opinion of the Court of Appeals for the Seventh Circuit.

Two of the judgments were awards of compensation for the Government's taking of two of the petitioners' rights and interests, as lessees from respondent, Clark-Congress Corporation, in certain parts of the Rand McNally Building in downtown Chicago, Illinois. These two judgments were based on jury verdicts determining the value of the property taken from Intertype and Merchants, respectively (R. 616, 617).

The other three judgments were rendered by the district judge after a subsequent trial without a jury in the same proceeding. They awarded damages to the three petitioners as tenants, against Clark-Congress Corporation as their landlord, because it committed breaches of the covenants of quiet enjoyment in their leases during a period prior to the institution of the Government's condemnation proceedings.

Petitioners' various rights and claims arose out of a train of events beginning shortly before June 22, 1951. After brief negotiations, (R. 674) the General Services Administration, housekeeping agency for respondent United States, on that date entered into a lease (R. 81-93) with respondent Clark-Congress Corporation, an Illinois corporation which owned the Rand McNally building in

downtown Chicago. The purpose of the lease was to acquire office space for the Bureau of Public Debt (R. 681), an old-line agency then housed in the Merchandise Mart in Chicago (R. 682).

Title 40, U. S. C., Section 304c (App., p. 41), authorized the Government to lease office space outside of the District of Columbia but only for terms not exceeding five years. The lease in a single document assured the Government of the right to possession for ten years and five months, divided into three periods as follows:

(a) A transition period from August 1, 1951 to December 31, 1951, under which the Government leased 80,000 square feet of vacant space in the Rand McNally building with a provision for the Government's taking over additional space as the same might become available through the expiration, termination, or cancellation of existing tenancies. (R. 81-2.) During this period Clark-Congress Corporation, the landlord, was to remain in possession and operate the property. (R. 84.) The Government was just a co-tenant with petitioners. The petitioners' claims against Clark-Congress arose during this transition period.

(b) A five-year term commencing January 1, 1952 and expiring December 31, 1956 in which the Government leased for $2,500,000 ($500,000 per year) the entire building ostensibly[1] "subject to existing leases" and assumed

1. The trial court held (Conclusion of Law No. 4, App. p. 56): "The provision that the Government lease was subject to the Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., leases was not a bona fide provision, and the lease, on its face, clearly shows that, at the time of making thereof, it was contemplated both by the Government and Clark-Congress Corporation that by one means or another the Government would end and terminate the right of Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., to occupy their said spaces at the earliest practicable date. The letters sent to Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., by the Government fix that date as of November 1, 1951."

BLEED THROUGH POOR COPY COPY

the entire operation and management at $308,000 per year (R. 440) and extensive remodeling and repair of the premises (R. 82, 84) at a stipulated total cost of $2,500,000 for the five years (R. 609-610).

(c) An option to renew for a further term of five years, commencing January 1, 1957 and expiring December 31, 1961 at the same rental and on the same provisions (except as to remodeling) as the 1952-1956 term (R. 83).

At the time of making this lease the Rand McNally Building was occupied by approximately eighty tenants under eighty leases which ran for varying terms of years. Only four small leases were to expire prior to December 31, 1951 (R. 1000-1003). Petitioner Intertype's lease was to expire December 31, 1958.[2] Petitioner Merchants' lease was to expire August 31, 1953. Petitioner Advertising's lease was to expire April 30, 1955. These leases comprised the business homes of the petitioners and their main offices in the City of Chicago.

On June 22, 1951, the same day its lease was entered into, the Government mailed letters advising petitioners and the other tenants in the building that it required their spaces (R. 586, 603, 1012). As a result of consternation and confusion caused by these letters, eleven tenants left the building in August of 1951 and fourteen others followed in September, 1951 (R. 1004-6).

Commencing on October 9, 1951, the Government, with the active cooperation of Clark-Congress Corporation, commenced extensive remodeling throughout the building (R. 701). Twenty-three more tenants departed during October, 1951, and the balance of the tenants, except the petitioners, had all abandoned the building by December 3, 1951 (R. 945).

The events during this transition period, when respond-

2. The Government and the landlord stipulated in writing during the trial that the Government's taking should be considered the taking of the entire balance of Intertype's term (R. 108-9).

BOUND TOO CLOSE IN CENTER

ent Clark-Congress was still in charge of the building and when the Government was merely a tenant in certain space in the building (not yet having condemned petitioners' leaseholds) can best be stated in the language of Findings of Fact (R. 1077-1083, App., pp. 47-55) of the trial court, which had heard the testimony of numerous witnesses and judged their competence and their credibility. Key Findings include the following:

> "4. Following the execution of said lease, Clark-Congress Corporation between the period from June 22, 1951, and to and including December 31, 1951, permitted the United States Government, the General Services Administration, and their employees, agents, and servants, including contractors, subcontractors and laborers engaged in remodeling of the building, free and unlimited access to the building and acquiesced in and permitted such persons to knock down walls, tear out partitions, create dust, noise and disturbance throughout the building, usurp and interfere with elevator service, toilets, corridors and other services used by the tenants, interfere with and interrupt electrical, steam, and other utilities furnishing light and power to tenants,[3] and by correspondence and unlawful de-

3. The nature and extent of the disturbance of petitioner's possession is also expressed in Findings 10 and 15 (App., pp. 50, 52-53), as follows:

> "10. * * * alterations and reconstruction of the building in October, November and December of 1951, in the manner shown by the evidence; * * * resulted in creating excessive dust, noise, and other disturbances, interference with the elevator, electrical, steam and other services, obstruction of corridors and of the courtway and loading facilities of the Rand McNally Building."
>
> "15. The acts of Clark-Congress Corporation and of the United States of America in the Rand McNally Building, during the period from June 22, 1951, to December 31, 1951, were far above and beyond the usual and ordinary remodeling that customarily goes on in a building of this type, * * * and created great noise, dust, confusion, uncertainty and unrest among the employees of said tenants, as well as very material disturbance of said tenants' comfort and business.
>
> "* * * the alteration and reconstruction of the building during the months of October, November and December, 1951, disturbed Merchants Matrix and its possession of the premises

BLEED THROUGH POOR COPY COPY

mands for possession to harass and disturb tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., and generally to interfere with and disturb the orderly and normal operation of the building which the tenants in possession were entitled to under their leases then in force.

"5. Clark-Congress Corporation, its employees and agents, were in control of the building during said period from June 22, 1951, to December 31, 1951, * * * [and] acquiesced in and participated in a concerted effort to force or induce the tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., to vacate or abandon the building and to surrender their leases, notwithstanding the fact that said leases were in full force and effect and that the Merchants Matrix Cut Syndicate leases had approximately two years to run, the Intertype Corporation lease had more than seven years to run, and The Advertising Checking Bureau, Inc., lease nearly four years to run.

* * * * *

---

under lease to it and rendered the premises unfit for occupancy for the purposes for which Merchants Matrix had leased and occupied them and deprived Merchants Matrix of the beneficial enjoyment of the premises by unduly interfering with its normal business operations and caused Merchants Matrix to abandon the premises. * * *

"A hole was knocked through the walls of Intertype's space while it was in lawful possession thereof during the process of demolition of adjoining space.

"Some of the demolition work done during this period was in the space adjoining the space occupied by The Advertising Checking Bureau, Inc., and in space on the ninth floor directly above the space occupied by The Advertising Checking Bureau, Inc. The noise caused by such demolition work was so great that often it was necessary for officers and employees of this tenant to discontinue telephone conversations and advise the caller that the person talking would call back when the noise lessened. This noise also made it impossible for this tenant to use Ediphone dictating machines in its space. As of November 10, 1951, the position of The Advertising Checking Bureau, Inc., as a tenant in the space occupied by it became intolerable, and on that day it determined that its rights as a tenant were being disregarded, and it decided to remove from the Rand McNally Building as soon as possible. * * *"

"7. It is apparent from the evidence and the lease of June 22, 1951, that a definite and wilful plan and intention existed and was carried out by the joint and combined efforts of Clark-Congress Corporation, the United States Government, the General Services Administration, and their respective employees, agents and servants to rid the Rand McNally Building of all or substantially all tenants as soon as possible after June 22, 1951 to secure possession of the space occupied, respectively, by Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., prior to January 1, 1952, and to secure substantially complete possession of the entire building for the Government on or about January 1, 1952, in so far as their combined efforts could bring this about.

* * * * *

"11. The failure of Clark-Congress Corporation to interfere with, complain about, or protect the tenants against, the actions of the Government in the alteration and reconstruction work, and the letters from the General Services Administration demanding that the tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., remove from the building, was a breach of the landlord's duty of furnishing to its tenants under continuing leases protection against interference and disturbance by third parties of their tenancies.

"12. Clark-Congress Corporation, in accordance with the terms of its lease to the Government, did certain acts of its own to interfere with the tenancy of Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., including curtailment of services and letting the Government tear down walls in spaces as to which Clark-Congress was still the landlord, and also co-operated with the General Services Administration in encouraging and permitting undue interference with the tenancies of said three tenants, and authorized and ratified certain acts done by the General Services

BLEED THROUGH POOR COPY

Administration in alteration and reconstruction of the building, and in all of these actions was a joint tort-feasor with the General Services Administration.

"13. Clark-Congress Corporation * * * breached its duties of quiet enjoyment to Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc. and other tenants in possession.

* * * * *

"16. As a result of the foregoing, Merchants Matrix Cut Syndicate, Inc., has suffered actual damages in the amount of $44,027.91, * * * Intertype Corporation has suffered actual damages in the sum of $41,498.98, * * * The Advertising Checking Bureau, Inc., has suffered actual damages in the sum of $96,949.78, * * *"

In short, the trial court found that Clark-Congress Corporation had knowingly and intentionally inflicted substantial injury upon each of the petitioners in violation of its duties as a landlord under their leases and under the law of Illinois.

On December 12, 1951 (R. 7) the Government instituted condemnation proceedings under Title 40, U. S. C. Sections 257 and 304(c) against the three petitioners, who were the only tenants remaining in the building. A declaration of immediate taking was also filed by the Government, reciting as the authority for immediate taking, Sections 257, 258(a) to (e), and 304(c) of Title 40, U. S. C. The Government deposited for the benefit of Intertype the sum of $5,250.00, for Merchants, $6,645.00, and for Advertising, $10,000.00. The declaration of taking, however, clearly stated that, far from being the estimated value of the leaseholds being taken from these particular tenants, as required by Section 258a, the deposits were the amounts "estimated by the acquiring authority to be just compensation for that portion of the aforesaid term commencing January 1, 1952 and ending June 30, 1952" (R. 11).

Respondent Clark-Congress Corporation, the landlord, was made a party defendant in the condemnation proceeding by the United States.

In the condemnation case a summary judgment was entered against Advertising, the trial court finding it entitled to no compensation from the United States because of a so-called "condemnation clause" in its lease. With regard to Intertype and Merchants, a jury trial was had in the course of which evidence as to the value of space in the Rand McNally building ranged from far above (R. 362, 365) to far below (R. 179) the valuations finally arrived at by the jury verdicts. Two judgments awarding just compensation for the value of their respective leasehold interests were entered on January 29, 1953 in the District Court—one in favor of Intertype in the amount of $131,500.00, and the other in favor of Merchants in the amount of $43,750.00 (R. 618).

Several months later, the counterclaim[4] and cross-claims[5] proceedings were tried before the District Judge. These were claims against the landlord based on the events of October through December, 1951, while Clark-Congress was fully responsible,—torts against the petitioners committed by the landlord and by remodelling contractors, moving contractors and co-tenants with the cooperation, authorization and consent of the landlord; and the landlord's breach of the covenants of quiet enjoyment of petitioners' premises prior to the condemnation proceedings by making a second lease for the space

4. Intertype Corporation had counterclaimed against Clark-Congress Corporation as an adverse party since in all respects it was aligned with the Government (R. 39). The Government's designation of Clark-Congress as a defendant was of course not conclusive. See Rule 19, F. R. C. P.

5. Merchants Matrix and Advertising had filed cross-claims against Clark-Congress, their co-defendant (R. 44, 45). The propriety of the designations of the three tenants' claims is immaterial in view of Rule 8(c), F. R. C. P.

BLEED THROUGH POOR COPY

already under lease to the tenants, and by planning and actively participating in harassment and other activities to compel the petitioners to vacate the premises.

These claims against the landlord were founded upon the law of landlord and tenant, and not upon the law of eminent domain. Their filing in a condemnation case was appropriate under Rules 71A, 13 and 18, F. R. C. P., because the same parties were involved and they arose out of the events which culminated in the taking of petitioners' property. Before petitioners' property was taken by the United States, the Government had no legal right to interfere with petitioners' quiet enjoyment of their premises and of the services and facilities of the building. All through that time, respondent Clark-Congress was in charge of the building and had the legal duty to protect petitioners from any such interference.

Judgments for the amounts indicated in Finding of Fact 16, *supra*, were entered on June 26, 1953, in favor of the respective petitioners and against respondent Clark-Congress (R. 1088-90). The damage figures included moving costs for each petitioner. Advertising's judgment against Clark-Congress also included the market value of its lease (less rent reserved)[6], in addition to its moving costs.

The Government filed an appeal from the two condemnation judgments (R. 1123). Clark-Congress filed three separate appeals, one from each judgment against it (R. 1130-3). The Court of Appeals reversed all five judgments in the opinion (App., pp. 71-87) of which petitioners now seek review.

---

6. Since Merchants and Intertype were recovering the market value of their leases, over and above the rent reserved, from the Government, this element was omitted from their judgments against Clark-Congress.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals affects two vital areas of constitutional law, and entangles them both so hopelessly that the decision will be dangerous if not reversed.

In the area of the Bill of Rights,—the safety of private property against arbitrary confiscation by the Government,—the effect of the decision is to permit officers of the Government to take private property in its name, without statutory authority, without making lawful provision for just compensation and without due process of law. Moreover, it has the effect of cloaking a private property-owner who enters into an agreement with the Government with similar tyrannical power and with a degree of immunity to the claims of its injured tenants measured by the immunity of the sovereign itself.

In the area of State-Federal relations under the federal system, it deprives tenants of their fundamental right to invoke the laws of the States to redress injuries inflicted on them by landlords.

The decision below also raises an important question under the Federal Rules of Civil Procedure. While recognizing that the applicable Rules[7] allow condemnees to plead and prove claims against other parties in condemnation cases, the ambiguous opinion below either restricts a condemnee injured *by another private citizen* in transactions leading to the eventual condemnation of his property to his remedies against the condemnor or, if it merely holds that petitioners' mistake was procedural, in filing their claims *in this cause*,[8] endorses the very multiplicity and

7. Rules 71A, 13, 18(a) and 42(b) F. R. C. P., printed in Appendix, pp. 44-46.

8. See footnote 16 at the end of the opinion, and discussion to which it refers (App., p. 87).

BLEED THROUGH POOR COPY

circuity of actions which the Federal Rules of Civil Procedure seek to avoid. The result of the opinion, however interpreted, is to emasculate the privilege of filing cross-claims and counterclaims against other parties in condemnation cases, a privilege which the first part of the opinion specifically recognizes to be allowed by the applicable Federal Rules of Civil Procedure.

Moreover, the action of the Court of Appeals itself denies due process of law to petitioners, by ignoring stipulations in the record, completely disregarding the evidence and the findings of fact, conclusions of law and jury instructions, paying lip service to Rule 52(a), Federal Rules of Civil Procedure and then grossly violating the rule, placing a sinister and cynical interpretation upon the motives of these petitioners and erroneously applying the measure of damages in condemnation proceedings between condemnor and condemnee to actions between tenant and landlord.

Prior decisions of this Court in eminent domain cases are cited by the court below as compelling these shocking results, although none of them can reasonably be so applied. Prior decisions of this Court stating the fundamental principles violated by the decision below are ignored by the Court of Appeals, and its opinion does not even reflect awareness that they exist. The opinion of the Court of Appeals (App., pp. 71-87) is so hopelessly confusing and so utterly meaningless that even a cursory reading of it will convince this Court that something ought to be done about it.

I.

The decision below cries out for an exercise of this Court's power of supervision. In Rules 52(a) and 61 of the Federal Rules of Civil Procedure, this Court and the Congress of the United States have laid down principles

governing the responsibility of the Courts of Appeals,—principles which have emerged from years of experience with capricious or ill-considered reversals on appeal of sound decisions by trial courts. Thus Rule 52(a) states: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of witnesses." And Rule 61 states that "no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for * * * setting aside a verdict or for * * * disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice."

In *U. S.* v. *National Association of Real Estate Boards*, 339 U. S. 485 (1950), this Court, at p. 49, said:

> "* * * our *mandate* is not to set aside findings of fact 'unless clearly erroneous'." (Italics supplied.)

U. S. v. *Yellow Cab Co.*, 338 U. S. 338, 342 (1949) and innumerable decisions of Courts of Appeals are to the same effect, including decisions of the Court below, e.g. *Central Ry. Signal Co.* v. *Longden*, 194 F. 2d 310 (7 Cir., 1952).

This is an extreme example of a case in which a Court of Appeals has ignored this important principle and rendered a capricious decision to the serious injury of the rights of petitioners.

The first three and a half pages of the text of the opinion below (App., pp. 72-75), state the case, with certain inaccuracies of slight moment here, and the next six pages lead up to this reluctant concession (App., p. 81): "Only by inserting a judicial rubric in Rule 71A could we interpret it as containing some lurking prohibition against invoking Rule 13. We read that Rule as it is written." Thus the court acknowledges that petitioners' cross-claims and counterclaim were permissible and hence finds

BLEED THROUGH POOR COPY

it necessary to deal with petitioners' judgments against their landlord, although saying (App., p. 81) that "empirical judgment inclines us away" from permitting such claims to be filed in condemnation cases at all.

In the thirteenth page of its opinion, the court summarily disposes of all of the detailed Findings of Fact with respect to petitioners' claims against Clark-Congress, stating (App., p. 83):

> "While the challenged findings are detailed, they are estranged from significant items of evidence disclosed by this record."

This gratuitous remark is never explained. The court, having said no more about any of the other findings, added (App., pp. 83-84):

> "But we do think that the findings, *inter alia*, which exhibit computations of damages predicated upon the 'cost of moving out' of the premises in question, flow from errors of law impairing the three judgments against Clark-Congress."

The above are the only criticisms which the Court of Appeals directed to the trial court's factual findings in support of the three judgments against Clark-Congress. The reversal of these three judgments is thus in direct disregard of Rule 52(a), F. R. C. P., and in direct conflict with the applicable decisions of this Court.

If the Court below can avoid the mandate of the Congress of the United States as expressed in Rule 52(a), F. R. C. P., and the mandate of the decisions of this Court interpreting said Rule by merely paying "lip service" to it, and deliberately writing an opinion devoid of any factual recitals (and containing no law persuasive of a reversal) and thereby attempt to hide this arbitrary evasion of this mandate, then said mandate becomes meaningless to litigants in the United States Courts, and Rule

52(a), F. R. C. P. becomes a nullity. It was beyond the proper province of the court below to ignore the detailed Findings of Fact in the trial court, which findings were based on the trial court's judgment of the credibility of the witnesses, without holding such findings to be "clearly erroneous". The opinion below therefore obviously calls for the exercise of this Court's power of supervision, as it is a clear departure from the proper standard of judicial review and from the accepted and usual course of legal proceedings.

In fact the recent opinion of this Court in the case of *McAllister* v. *U. S.*, 348 U. S. 19, 20 (1954) reversed a Court of Appeals which had used the proper standard of review, because that court had set aside findings of the district court that were not "clearly erroneous". The court below has reversed petitioners' judgments by applying its own new standard of review,—whether the findings were "estranged from significant items of evidence", although it attempts to conceal the fact in confusing and obscure verbiage.

If the opinion below is allowed to stand it will be an open invitation for reviewing courts to deprive litigants of the benefit of the trial judge's observation of the credibility of witnesses, and may well tend to render useless the mandate of Rule 52(a), F. R. C. P., and to deprive litigants of their constitutional right to "due process of law". In addition, trial courts may well be affected by the futility of preparing Findings of Fact if they are to be so cavalierly ignored.

Since the reversal of the judgments against Clark-Congress could not stand upon the statements of the opinion below about the Findings of Fact, it can rest only upon principles of law. Obviously, findings of fact cannot "flow from errors of law," as stated in the confused opinion below, but their effect may depend upon the legal conclusions of the court. However, the Court of Appeals did not discuss

BLEED THROUGH POOR COPY

the trial court's conclusions of law. It merely assumed, without stating why, that it was error for the trial court to apply the Illinois common law to claims between private parties. Instead, it improperly applied the federal law of eminent domain to such claims.

Having thus discarded the three judgments against Clark-Congress, the court next came to the jury awards of just compensation leading to the two judgments against the Government, where no question as to liability could possibly exist, and wrote a truly remarkable one-page-long statement (App., pp. 85-86) as its *only* basis for reversal of these two judgments.

This part of the opinion begins by impugning petitioners' motives:

> "All too frequently, profit seeking motives creep into condemnation cases. This observation, no doubt, will be distasteful to those who envisage the public treasury as fair game in such proceedings;"

continues by uttering truisms which no one in this case would dispute or had disputed:

> "* * * just compensation, only, remains the yardstick in eminent domain proceedings. * * * When the Treasurer disburses compensation in obedience to an order of award, based on condemnation proceedings, public dollars stand in lieu of land, premises or interests, so acquired, and thereafter devoted to public use;"

then quotes from an opinion relied upon in the trial court by all concerned, *U. S.* v. *Petty Motor Co.*, 327 U. S. 372 (1946), and cites two other opinions of this Court which had also been scrupulously followed throughout the trial,—*U. S.* v. *General Motors Corp.*, 323 U. S. 373 (1945) and *U. S.* v. *Westinghouse Electric & Mfg. Co.*, 339 U. S. 261 (1950).

One final gibe at the trial judge and counsel was all that remained to be done (App., p. 86):

> "Perhaps we are underscoring the obvious, but it is our opinion that the jurors' critical and difficult function, here, should not be further complicated by blurred and insufficient instructions or by improper arguments." (Citing two cases.)

The instructions which in the court's eye seemed "blurred", and the arguments which in the court's ear sounded "improper", were not further identified. Petitioners and the trial judge are left in the dark as to why the Court of Appeals has reversed the awards of just compensation based upon the jury verdicts. The "harmless error" rule (Rule 61, F. R. C. P.) is ignored, and the verdicts set aside with no apparent grounds.

We speculate along two lines. First, since the Court of Appeals describes one case cited (*Ramming Real Estate Co.* v. *United States*, 122 F. 2d 892 (8 Cir. 1941)) as "concerning and pointing up deposits made by the government pursuant to statute," the court may have believed that the *Ramming* case held the opposite of what it did hold. In the *Ramming* case, the jury used the high amount of the government's deposit, rather than the lower valuations shown by the evidence, in fixing the amount of compensation. In the instant case the deposits were far below the value proved, and their effect as evidence would therefore appear to have been to reduce the verdict, if the jury attached any weight to them. Second, we speculate that the Court of Appeals may have believed that the men and women on the jury were simply a bad lot, unable to maintain an "especially delicate", "acutely sensitive" equilibrium, after having commenced deliberations "in a positive awarding-state-of-mind." However, we know of no legal basis for reversing a judgment on any such ground.

BLEED THROUGH POOR COPY

Nor does it appear that the legal premise for the court's reversal of the judgments against petitioners' landlord had any logical relation to its decision to reverse the awards of just compensation. The whole basis for reversing the judgments against Clark-Congress appears to have been the fact that moving costs were included as items of petitioners' damages. But moving costs had no bearing on the two judgments of just compensation, since Merchants introduced no evidence as to moving costs before the jury, and Intertype's moving costs, which had been proved pursuant to the *General Motors* case when the Government was planning to take only five years of Intertype's remaining seven year term were excluded from consideration by the jury by explicit instructions (R. 553, App., pp. 64-65) after the Government stipulated (R. 108-9) that its taking had consumed the entire value to Intertype of the seven-year unexpired leasehold. Obviously the court could not properly find that the compensation awards to Merchants and Intertype included any allowance for those expenses which the court deemed unallowable.

For a reviewing court to set jury verdicts aside on the ground of the possible effects of unspecified "improper" arguments and unidentified "blurred" instructions upon the jury's supposed "delicate equilibrium", and "awarding-state-of-mind" is incredible. It elevates spiritualism to a place on the bench and converts an appellate hearing into a seance. It is certainly not "due process of law."

The effect of the decision below is to criticize the jury for performing its sworn duty to determine within the range of evidence, the just compensation for petitioners' property taken by the government, without so much as an intimation of any reason for ignoring the verdict. Public interest requires that the jury system of determining just compensation not be clouded by such an opinion of a reviewing court.

II.

The court below misapprehended and misapplied the decisions of this Court in *U. S.* v. *Petty Motor Co.*, 327 U. S. 372 (1946); *U. S.* v. *General Motors Corp.*, 323 U. S. 373 (1945) and *U. S.* v. *Westinghouse Electric & Mfg. Co.*, 339 U. S. 261 (1950), when it used these cases as its sole authority for holding (App., p. 83) that "these three tenants cannot improve on the amount of compensation [authorized by those cases] by taking damages from their landlord."

The decision below is in irreconcilable conflict with the decisions of this Court which hold that the immunity of the sovereign does not protect parties with or through whom the sovereign deals against liability to those whom they injure in the course of their actions on the sovereign's behalf. *The Bank of the United States* v. *The Planters' Bank*, 9 Wheat. (22 U. S.) 904, 907 (1824); *U. S.* v. *Lee*, 106 U. S. 196, 218-222 (1882); *Sloan Shipyards Corp.* v. *United States Shipping Bd. Emergency Fleet Corp.*, 258 U. S. 549, 567 (1922) and other cases dealing with the Fleet Corporation, cited in *Federal Land Bank* v. *Priddy*, 295 U. S. 229 (1935), rehearing den. 295 U. S. 769 (1935); *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381 (1939); *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575, 580-583 (1943).

The basic error of the decision below is expressed as follows (App., p. 83):

> "It would be a strange index of the compensatory redress for the acquisition of private property through eminent domain proceedings to allow these three tenants recovery from their landlord for moving, packing, and other expenses."

And in a clause later on (App., p. 85), stating that petitioners "were attempting to recover from Clark-Congress

BLEED THROUGH POOR COPY

for items not compensable by the sovereign," as if there were anything illegal in that.

The court below believes, obviously, that the tenants' recovery from their landlord is an "index" of their compensatory redress for their loss of private property through eminent domain. This ignores the lack of identity between the landlord and the sovereign.

The court failed to recognize that the sovereign's immunity from suit (except to the extent waived by statute or limited by the Constitution) does not protect those with whom the sovereign contracts. As this Court held in *Sloan Shipyards* v. *U. S. Fleet Corp. and United States*, 258 U. S. 549 (1922) referring to the Fleet Corporation: "the argument that it was so far put in the place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows" (258 U. S. C. 566) "is a very *dangerous departure from one of the first principles of our system of law.*" The decision, penned by Mr. Justice Holmes, continues:

> "But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man, *we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court.*
>
> "* * * The only serious question is whether special remedies have been provided by statute that displace those that otherwise would be at the plaintiffs' command. * * * The plaintiffs are not suing the United States but the Fleet Corporation; and if its act was unlawful, *even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immu-*

> *nity does not extend to those that acted in its name.* * * *" (Italics supplied.)

Thus a party which itself has the power of eminent domain is liable for injuries to private citizens arising out of its exercise of the power to condemn their property. Clark-Congress, in this case, did not have any such power, nor was it as closely identified with the Government as the Fleet Corporation had been, so there was far less reason to limit its liability to correspond to that of the United States.

The decisions of this Court in eminent domain cases were never meant to determine rights between private landlords and private tenants, and should not have been so applied by the court below.

In fact, when a government corporation acts in the capacity of a landlord, it thereby becomes subject to claims of tenants not compensable under the eminent domain clause, as was held in *Gillen* v. *Home Owners' Loan Corp.*, 8 N. Y. S. (2d) 945 (1938), affirmed, 280 N. Y. 261, 21 N. E. (2d) 521 (1939). There the court held:

> "Naturally, Congress would not expect or intend that the corporation or its agents would be permitted to be careless, negligent, or indifferent to the rights of tenants and be favored with immunity from all obligations or liability to them, whether of contract or of tort."

See also, *Prato* v. *Home Owners' Loan Corp.*, 106 F. 2d 128 (1 Cir., 1939). And it makes no difference whether the Government's lease undertakes to reimburse Clark-Congress for any judgments against it in its capacity as the landlord of the building. This Court, in *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575 (1943) granted relief to the widow of a customs inspector who died because a ladder broke while he was boarding a ship operated by the defendant under a contract with the U. S. Maritime Commis-

BLEED THROUGH POOR COPY

sion, despite the argument that the United States was the real party in interest, since "the United States ultimately will have to pay it by reason of provisions of the contract between respondent and the Commission." This Court held:

> "Even if we assume, without deciding, that the Commission has contracted to reimburse the respondent for such expenditures, it does not affect the result in this case.
>
> "* * * if petitioner had a cause of action against respondent, it is difficult to see how she could be deprived of it by reason of a contract between respondent and the Commission. Immunity from suit on a cause of action which the law creates cannot be so readily obtained."

The opinion goes on (p. 584) to state that "concessions made by contracting officers of the government" should not be permitted to take the place of Congressional action, in extending the government's immunity to its private contractors, and adds:

> "Such a change would be detrimental to the interests of private claimants, as we have said, since it would subtract from the legal remedies which the law has afforded them. Beyond that it would make the existence of a right to exoneration or indemnity a jurisdictional fact."

In the instant case, the landlord's right (par. 22b of lease, R. 91) to indemnity by the government was actually dealt with by the Court of Appeals as ousting the trial court from jurisdiction to grant relief against the landlord.

The Court of Appeals ordered the claims against Clark-Congress stricken because it believed that these claims sought to recover indirectly from the sovereign what petitioners could not obtain from it directly. This completely ignored the fact that the rights are different. It is the right that determines the liability here, and not the person.

The court's direction on remand that the district court grant the motions to strike these claims (App., pp. 87-90) ignored the fact that these motions were founded upon a notion that the courts should insert a "judicial rubric" in Rule 71A, F. R. C. P., to forbid counterclaims and cross-claims under Rule 13, F. R. C. P.

To sum up this point: The trial court had jurisdiction under the Federal Rules of Civil Procedure to determine the petitioners' claims against Clark-Congress under the common law of Illinois;[9] the facts as found by the trial court showed that the petitioners were all entitled to money judgments for damages; and the item of moving costs was a perfectly proper element of damages in such a case. The Court of Appeals reasoned backwards. It saw the moving cost element of damages and noted that this court in the *Westinghouse* and *Petty Motor Co.* cases had cut that tail off of the eminent domain dog. The court proceeded to cut the tail off of the landlord and tenant dog, an entirely different animal, without any legal justification.

The injustice of the decision is this: the sovereign can take private property with immunity from suit except as the sovereign's own law (the Fifth Amendment) provides for compensation, but the landlord is liable for all private wrongs it commits. As a part of the price of living in an organized society, each private citizen must submit to the eminent domain power of the sovereign, and accept such just compensation as the Fifth Amendment grants, but his rights against private parties are measured by the wrongs done him by such private parties. The Court of Appeals deprived petitioners of their rights against a private party, Clark-Congress Corporation, solely because petitioners did not have the same rights against the Government, a result which is contrary to the decisions of this Court in the analogous situations dealt with in the cases reviewed above.

9. As to Intertype's claim, diversity jurisdiction was also present.

BLEED THROUGH POOR COPY

III.

The court below fell into the error of *Swift* v. *Tyson*, 16 Pet. (41 U. S.) 1 (1842), when it ignored, and failed to apply, the common law of Illinois in reviewing petitioners' judgments against their erstwhile landlord.

The law of Illinois and the general common law of landlord and tenant give a tenant a cause of action for consequential and punitive damages against a landlord who disturbs or permits co-tenants to disturb his quiet enjoyment of the demised premises. *Chapman* v. *Kirby*, 49 Ill. 211, 217-18 (1868); *Dearlove* v. *Herrington*, 70 Ill. 251; *Northern Trust Company* v. *Palmer*, 171 Ill. 383, 388-9, 49 N. E. 553 (1898); *Kesner* v. *Consumers Co.*, 239 Ill. App. 92, 100 (1925); *Woods Theatre* v. *North American Union*, 246 Ill. App. 521, 525 (1927), and cases cited; *Gustin* v. *Barney*, 250 Ill. App. 209, 213 (1928); *Dobbins* v. *Duquid*, 65 Ill. 464, 467 (1872); *Tobin* v. *French*, 93 Ill. App. 18, 22 (1901); *Glickauf* v. *Maurer*, 75 Ill. 289, 20 A. R. 238 (1874); *Case* v. *Minot*, 158 Mass. 577, 33 N. E. 700 (1893); *Wood* v. *Montelcone*, 118 La. 1005, 43 So. 657 (1907); *Dehan* v. *Youree*, 161 La. 806, 109 So. 498, 500 (1926); *Paltey* v. *Egan*, 200 N. Y. 83, 93 N. E. 267 (1910); *Bagby* v. *Hodge*, 297 S. W. 882 (Tex. Civ. App. 1927); *Bancroft* v. *Godwin*, 41 Wash. 253, 83 Pac. 189 (1905); *Alexis* v. *Pittinger*, 119 Wash. 626, 206 Pac. 370 (1922); *Wusthoff* v. *Schwartz*, 32 Wash. 337, 73 Pac. 407 (1903); 51 *Corpus Juris Secundum*, §§ 319-325, pp. 993 *et seq.*

It matters not that the landlord has made its deal with one having the power of eminent domain. In *Dolman* v. *United States Trust Co.*, 134 N. Y. S. 2d 508 (Sup. Ct., N. Y. Co., 1954), the lessor of a private parking lot entered into an arrangement with the city of New York under which the city condemned the property, and the landlord, invoking a condemnation clause, terminated the tenant's valuable lease. There was no moving, demolition or construction

work to interfere with the tenant's use of the premises; just the termination of the lease and a continuation of the tenant in possession on a tenancy at will.

The tenant filed a complaint for damages, alleging that the landlord violated the covenant of quiet enjoyment. Denying a motion to dismiss, the Court held (pp. 510, 511):

> "* * * For, if the plaintiff can support his claim that the defendant by its affirmative act instigated and facilitated the condemnation proceedings and the consequent eviction, then in my view the plaintiff has presented a cause of action for breach of the covenant of quiet enjoyment. It is no answer that never before has such a cause of action been allowed. It may be that never before has such a set of facts been alleged. And it is the genius of our law, from before the time centuries ago when an 'action on the case' was created, that the courts would seek a way to grant a remedy so as to right a wrong done by one to another. * * * True, the lease by its terms and the law by its rule both recognize that the covenant of quiet enjoyment would not be violated by the city's taking of the property under the power of eminent domain. But the rationale behind the protection to the landlord in that regard is that here is an act of government separate and apart from the wish and cooperation of private parties. And neither the condemnation clause in the lease nor the general rule of law exculpates the landlord where, as claimed in the case at bar, the act of condemnation has been actively incited by the landlord for purposes of its own. If the covenant of quiet enjoyment is to have any force it means at least that the landlord must in good faith do nothing affirmative to deprive the tenant of possession, peaceable enjoyment of which the landlord contracted to assure to the tenant during the term of the lease. And that means, I think, nothing affirmative, not alone openly and directly, but also by subterfuge or indirection. As is generally the case in the law of contracts, supervening impossibility is an excuse for nonperformance provided there is no contributory fault on the part of the promisor. Restatement of the Law, Contracts, Secs.

BLEED THROUGH POOR COPY

457, 458, 460; 3 Williston on Contracts, Rev. Ed. Sec. 891, p. 2526; 6 Williston, Sec. 1939, p. 5433; Sec. 1959, p. 5495. I hold that on this complaint the plaintiff is entitled to prove (if he can) that the covenant of quiet enjoyment was violated by the defendant in this case notwithstanding the taking of the premises by the municipality, because, as alleged in substance by the plaintiff, that taking resulted from the contributory fault of the defendant."

The trial court in this case found as a fact that respondent Clark-Congress had planned and carried out the breaches of the covenant of quiet enjoyment in cooperation with the Government (Finding of Fact 7, App., p. 49 and Conclusion of Law 4, App., p. 56), without awaiting the event of condemnation, which did not occur until *after* several months of demolition, construction, moving and obstruction.[10]

The judgments in this case to award damages against the landlord were thus well-supported by the general common law as well as by Illinois law, which governed the relations between petitioners and respondent Clark-Congress.

The Court of Appeals treated the recent decisions of this Court dealing with federal condemnations but not with breaches of covenants of quiet enjoyment, as "a transcendental body of law outside of any particular State but obligatory within it" (Dissent of Holmes, *J.*, in *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 371 (1910)), divesting petitioners of their rights of quiet enjoyment during the several months prior to the condemnation.

10. Indeed both Clark-Congress and the agents of the Government made it plain to the trial judge that they sought by harassing and disturbing the tenants to make condemnation unnecessary as a way of getting the tenants to move out. The wording of the Government's lease clearly shows this plan to use condemnation only as a last resort, if harassment failed. The campaign did eliminate 77 of the 80 tenants, but the special space requirements of the three petitioners prevented them from getting out of the way of the juggernaut before its ultimate power of eminent domain cast them out after the others.

The court did not discuss the Illinois law on the subject, nor acknowledge that any form of evidence would have satisfied it that petitioners were entitled to any relief against respondent Clark-Congress.

Obviously, such disregard of the law of a State violates one of the first principles of jurisprudence in our federal system of government, set forth in section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, and reenacted with minor changes on June 25, 1948, c. 646, § 1, 62 Stat. 944, 28 U. S. C. § 1652, as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Erie R. Co. v. *Tompkins,* 304 U. S. 64 (1938), rehearing denied, 305 U. S. 673 (1938).

Since, as shown above, the immunity of the United States does not extend to those that act in its name, the federal law of eminent domain does not supplant State common law in the relations of petitioners and their former landlord.

IV.

The district court had jurisdiction to grant relief upon petitioners' cross-claims and counter-claim. Petitioners shall not here present the arguments in support of this jurisdiction of the district court in the rare condemnation cases where such claims arise out of the same set of circumstances as the condemnation. The Court of Appeals devoted the bulk of its opinion to this problem, and as we understand its discussion, reached the conclusion that such claims are permissible. Petitioners do not seek a review on this point.

However, the *effect* of the decision below is to deny jurisdiction of such claims in any case, on the ground that

BLEED THROUGH POOR COPY

condemnees may never claim damages by counterclaim or crossclaim from private parties for injuries inflicted upon them in connection with the taking of their property by or for the Government. If the building contractor employed for the remodelling work had destroyed a tenant's typesetting machine with a misdirected sledgehammer, the Court of Appeals would check the law of eminent domain to determine whether the damages were compensable by the sovereign. If the landlord, seeking to make space available to the Government, had employed strong-arm men, one of whom had assaulted and critically injured a tenant, that court would deny a right to claim damages, on the theory that just compensation for the taking of property concerns only the fair cash market value of property taken, and no further or additional amounts can be recovered in the same case, albeit in separate proceedings without a jury, pursuant to Rule 42(b), from anyone connected with the transactions.

We submit that the court below reached the right result in its study of Rule 71A and its relations to others of the Federal Rules of Civil Procedure, but vitiated and emasculated the result when it directed the trial court to grant Clark-Congress' motion to strike the counterclaim and cross-claims in this case. The result, if allowed to stand, is to violate the provisions and the purposes of the Federal Rules of Civil Procedure, and return to the days of circuitous and multiplicitous suits for related claims and demands.

V.

The judgments of which the decision below deprives petitioners were the only tattered vestige of due process which had been accorded them after a long chain of illegal activities whereby petitioners' Government and their landlord had joined forces to deprive them of their property rights.

By reversing those judgments, the lower court has, under the circumstances of this case, become an instrument of denial of due process of law to these petitioners.

Petitioners' leaseholds were taken in peacetime, for use as federal office space outside of the District of Columbia. This is the only case of a leasehold condemnation in peacetime, involving no war powers or emergency conditions, which has come to our attention. The purpose of taking petitioners' lease space was to gain possession under the Government's lease, and not to gain title to the building. Not only was there an absence of any emergency to justify recourse to this procedure, but in this case the Government's *lease* was illegal, the *taking* was illegal, and vacating the condemnation awards was likewise illegal.

The purported authority for the Government's lease was Title 40, U. S. C., § 304c, which contains the following authorization:

> "The Administrator of General Services is authorized to procure space by lease, on such terms and for such period not in excess of five years as he may deem in the public interest, for the housing of any Federal agency or agencies outside of the District of Columbia, * * *."

Under this authority, the General Services Administration leased the Rand McNally building for a period *in excess of five years,*—the lease purported to bind the Government to its provisions for a period of five years and five months. If the Government's option to renew for five years on the same terms is considered (and the Court of Appeals apparently considered it, App., p. 84), the period was for more than ten years. Thus one limitation upon the power to lease the building was violated from the outset.

Additional restrictions relating to the amount of rent that could be paid and the amount that could be spent for

BLEED THROUGH POOR COPY

improvements on leased property contained in § 278 (a) of Title 40, were likewise violated by the GSA in this deal.

The legality of the taking under Section 257 of Title 40 depends first upon whether it was for public use. In this case, the taking was for the purpose of gaining possession under an illegal lease and therefore was itself illegal.

The legality of the taking further depends upon the making of the deposit required by law. Section 258a of Title 40 permits the United States to file a declaration of immediate taking signed by the person "empowered by law to acquire the lands described," which declaration must show the authority for the taking, a description and a plan of the property and a description of the estate or interest taken, and "a statement of the *sum of money estimated by said acquiring authority to be just compensation for the land taken.*"

Only after the deposit of the amount of the estimated compensation stated in the declaration does the title or interest taken vest in the United States. The government's failure to make such a deposit in this case therefore raises a serious doubt as to whether the taking was lawful.

This is a case where property was taken at the beginning of 1952, and 1955 will certainly be over before just compensation shall have been paid. Moreover, this was not an emergency taking, under the War Powers Act or otherwise, compare *City of Oakland* v. *U. S.*, 124 F. 2d 959, 964 (9 Cir., 1942), but a peacetime action under permanent legislation, to provide office space outside of the District of Columbia for one of the old-line bureaus having the least to do directly with the crises of our times,—the Bureau of Public Debt.

There is much authority for the general proposition that provision *in advance* for just compensation is a prerequisite

to a lawful taking by eminent domain at least unless national emergency or dire public necessity requires otherwise. In *Hanson Co.* v. *U. S.*, 261 U. S. 581, 587 (1923) this Court held that an "owner is protected by the rule that title does not pass until compensation has been ascertained and paid, nor a right to the passession until reasonable, certain and adequate provision is made for obtaining just compensation." And in *Seaboard Air Line Ry.* v. *U. S.*, 261 U. S. 299, 305 (1923), it was held that "a necessary condition of the taking is the ascertainment and payment of just compensation."

The statute relied upon in this case provides for a deposit, at the time of taking, of the full estimated value of the property taken. The amount deposited is subject to withdrawal by the condemnee, pending the final determination of the proper amount to be paid.

In this case, however, the government deposited only the value of a small fraction of the property taken,—the estimated value of only six months' occupancy of the space. There might as well have been no deposit at all.

The action of the Court of Appeals, viewed in the setting of the case, denies due process of law and just compensation to petitioners. The following are the most important elements which show the combined effect of the acts of the landlord, the Government, and the Court of Appeals, upon petitioners' legal rights.

1. The illegal lease between the Government and Clark-Congress Corporation made on June 22, 1951 (R. 81-94).

2. The attempt to secure possession of the entire building for the Government by letters of demand disclosing no claim of right (R. 584, 586).

3. The intentional interference with petitioners' oc-

BLEED THROUGH POOR COPY

cupancy and quiet enjoyment for several months before the taking, and the denial of damages therefor against Clark-Congress by the Court of Appeals.

4. The ouster within a six-months period of 77 out of 80 long-term tenants without compensation.

5. The obvious understanding, as evidenced by the June 22, 1951, lease and the testimony, that the Government would be put in full possession of the entire building by January 1, 1952, and the actual physical accomplishment of that fact by joint "cooperative" action as called for in the lease.

6. The agreement that the Government pay 2½ million dollars rent and 2½ million dollars of improvements into the pockets and building of the landlord for possession taken from the tenants.

7. The continued efforts by the Government to prevent any liabilities being imposed on the landlord, by leasing "subject to existing leases," promising to indemnify the landlord by indemnity clauses in the lease, and instituting the condemnation proceedings.

8. The attempt to oust these defendants without even the courtesy of notice or any attempt at fair dealing (R. 12-13).

9. The voluntary dissolution of the landlord corporation on December 27, 1951, immediately after the landlord had completed performance of its understanding with the Government (R. 968-974).

10. The *immediate* taking of petitioners' space, without advance compensation.

11. The failure to deposit a fairly estimated monetary equivalent of the value of the full term of the leaseholds taken from petitioners (R. 11).

12. The combination of the Government and landlord throughout this action to defeat or delay any re-

covery by these petitioners until lengthy litigation has consumed any possible awards.

13. The constant hiding behind the screen of immunity of the sovereign and the Fifth Amendment in a proceeding where no just compensation has been given, and in view of the cost of legal proceedings, none can now possibly be attained by petitioners.

14. The delay of more than a year after filing a notice of appeal before government counsel certified the record to the Court of Appeals.

15. The filing of a brief, *amicus curiae,* in the Court of Appeals by government counsel, opposing the right of condemnees (petitioners here) to recover damages from their landlord (R. 70).

16. The reversal of the condemnation awards by the Court of Appeals although such awards were within the range of the evidence.

17. The reversal of the judgments for damages against the landlord, by ignoring the Findings of Fact and on erroneous legal assumptions.

18. Remanding all five judgments to the trial court without any guidance as to the reasons for the remand, the manner in which a new trial should differ from the first one, or specification of any errors in the original proceedings in the trial court.

19. The tremendous cost of litigation and appeals heretofore, with more expected hereafter, without which petitioners would receive only the pittance originally deposited.

We do not assert that any one of these developments, standing alone, would amount to a denial of just compensation or of due process of law. But the cumulative effect of all of them is to leave petitioners, more than three years after their property was taken, with a negligible part of

BLEED THROUGH POOR COPY

its value accessible to them, and with no hope for a final order authorizing full payment of the entire value for many months, and perhaps years, yet to come.

The erroneous, garbled and confused decision of the Court of Appeals opens a vista of continuous run-arounds for years to come, before a jury can be impanelled which will suit the court's taste and render a verdict which it will uphold on appeal. A worse run-around, from the District Court in Tort Claims proceedings to the Court of Claims and perhaps even to the State courts, appears to be the prospect for the claims against Clark-Congress, with the Statute of Limitations perhaps already run by reason of the voluntary dissolution of that corporation on December 27, 1951.

The Court of Appeals decision, if allowed to stand, will by a smokescreen of meaningless words and innocuous platitudes, sanction and encourage this outrageous pattern which makes a mockery of the phrase "just compensation." As this Court stated in *U. S.* v. *General Motors Corporation*, 323 U. S. 373, pp. 381-382:

> "If such a result be sustained we can see no limit to utilization of such a device; and, if there is none, the amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing 'just compensation' into some such concept as the common law idea of a peppercorn in the law of seizin or the later one of 'value received' in that of contractual consideration."

The course of action by the Government and the Court of Appeals having violated petitioners' constitutional rights, the statutes and cases relied upon must be reconsidered and their meaning made clear, as a matter of general public importance, to avoid such results. Resolution by this Court of the issues presented in this case is vital

and cannot await further proceedings below, without further denial of petitioners' rights.

The court below has sanctioned, by its decision, the method of taking under the condemnation power in this case, which is arbitrary and without statutory authorization and imposes on the condemnee a harsh and unjust deprivation of property in obvious violation of the provision for just compensation in the Fifth Amendment to the Constitution. The court has approved a method whereby over five million dollars of federal moneys are paid to the corporate landlord to secure possession of the building under a lease which specifically requires the landlord to breach its contracts with its tenants.

Under the lease between the landlord and the Government (R. 91) the lessor expressly agreed "to cooperate with the Government to secure the cancellation or termination of * * * existing tenancies" and the Government to indemnify the landlord against "all responsibility for all loss, liability or expense arising out of any termination or attempted termination or cancellation or eviction of any existing tenancy or tenant * * * or of any disturbance in any manner whatsoever of the occupation or use of the space in the building or the right to do so by any such existing tenant whether any of the foregoing should result or arise from condemnation or other proceedings or otherwise."

The arrangement provided not only for payment to the landlord of a larger net rental than the landlord was previously receiving from the evicted tenants but also provided for the complete remodeling and modernizing of the landlord's building at Government expense, the installation of new elevators, new heating plant, alternating current and other items involving an expenditure of two and one-half million dollars (See Stipulation, R. 609-10). It is obvious from the lease that to secure these advantages the

BLEED THROUGH POOR COPY

landlord was required, under the lease, to evict all tenants from the building on or about January 1, 1952, regardless of the nonexpiration of the tenants' leases.

VI.

The decision of the Court of Appeals states that Intertype's recovery of just compensation against the Government "must be delayed until it is known whether the Government's occupancy has exhausted the tenant's leasehold" (Opinion, p. 13), citing *United States* v. *Westinghouse Electric & Mfg. Co.*, 339 U. S. 261 (1950). This an improper extension of the *Westinghouse* decision deferring the award of just compensation or a part thereof for five-years after the original taking. It also totally disregards, and abrogates the stipulation (R. 108-9) that the award should be based on the taking of the entire balance of Intertype's ten-year term, a solemn stipulation made by the Government attorney only after consultation with his superiors in Chicago and in Washington. We do not know of any rule which permits the Government to renege on a stipulation duly authorized and solemnly made. This decision by the Court of Appeals is manifestly an abrogation of the rights guaranteed by the Fifth Amendment and a complete departure from all reasonable principles of justice and fair play.

Moreover, the very moving costs on which the reversal of all of the judgments was predicated, were introduced by the Government (R. 322), as its Exhibits 22, 23 and 24 (R. 577-9). Subsequently, the instructions given the jury, which the court below termed "blurred" and "insufficient", were agreed to by government counsel during the trial (R. 466, 476-7, 485, 511).

Petitioners are thus crushed between the upper millstone of the Court of Appeals and the nether millstone of the conduct and stipulations of government counsel during the

trial. Such a procedure is in itself a departure from proper judicial procedures, calling for the exercise of this Court's supervisory authority.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD B. LUCIUS,
EDWARD G. LUCIUS,
Attorneys for Petitioner Merchants Matrix Cut Syndicate, Inc.

SHERWOOD K. PLATT,
CHARLES L. STEWART, JR.,
Attorneys for Petitioner Intertype Corporation.

HORACE A. YOUNG,
Attorney for Petitioner The Advertising Checking Bureau, Inc.

Of Counsel:
MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT
LUCIUS & LUCIUS.

April 15, 1955.

BLEED THROUGH POOR COPY